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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

SUSAN TAVE ZELMAN,
Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.[1] USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus authored this brief, in whole, and no person or entity other than the amicus made a monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

of this Court's jurisprudence in that regard.

Especially in the past decade, States have struggled with how best to provide meaningful educational choices to parents who lack resources to choose from the many educational opportunities available. This case involves such a mechanism, provided by Ohio for low income parents whose children are in the Cleveland School District. This case offers an opportunity to clarify that the Establishment Clause is not violated when a public program, neutral with respect to religion, allows individual parents to choose from religious schools among the available educational options. In this case, religious schools participate as one part of a much larger educational whole. Relying on record evidence that consistently demonstrates wholly private, individual decisionmaking, and reaffirming that suspicion about the nature of religious schools' and parents' desire to use them is no longer a legitimate basis for deciding cases, this Court can clearly confirm the role of religious providers as participants in a public program in which low income families benefit. The Ohio Pilot Scholarship program is both constitutionally and educationally sound.

SUMMARY OF ARGUMENT

The case at bar is a new issue for the Court, but is not a new problem. This Court has interpreted the Establishment Clause to reflect the common sense conclusion that secular programs directed at secular interests, neutral with regard to religion and freely available to a broad class of citizens, do not become unconstitutional when religious institutions provide services under those programs. *Cf. Bowen v. Kendrick*, 487 U.S. 589 (1988) (inclusion of religious institutions among service providers to address teenage pregnancy constitutional). Absent an affirmative intention to discriminate with respect to religion, such a program, which offers potential program beneficiaries the chance to make a personal choice about where to obtain

such benefits, does not violate the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

The decision below represents an attack upon the Ohio legislature's legitimate and well-focused attempts to resolve a wholly secular concern: relief for low income citizens whose children attended schools in the Cleveland school district. The legislature designed a means to enable better choices for those who chose to stay in the Cleveland public schools. At the same time, it created a scholarship program for those who chose to leave. Only because many parents chose religiously affiliated schools for their scholarship children did this case become the latest episode in the ongoing struggle to set reasonable, workable, and constitutional boundaries between religion and government. Thus, this case also represents an attack on the private decisionmaking of thousands of Cleveland parents seeking the best possible education for their children. Without a scintilla of record evidence that the legislation's primary effect was to advance religion, the court below indulged in the same sort of "presumptions" and affirmative "hostility" to religion that this Court has explicitly rejected over the last 25 years.

This Court should confirm that there does exist a set of broadly applicable and usable standards that can be applied to evaluate public programs that may include religious institutions. These standards were ignored by the panel majority in favor of a unreflective application of a single nearly 30-year-old (and entirely distinguishable) opinion whose central propositions and assumptions the Court has incrementally but dramatically abandoned, among them that religious schools are presumptively disqualified from participation. Here the religiosity of a school has no constitutional significance because each school must agree to a set of state rules that govern its educational content and conduct. In addition, the record speaks plainly to the reasons why parents choose the schools they do

and why the schools and teachers are likely choices. The participating schools and their teachers care about the children they teach, and are successful at educating children in an environment that promotes and respects their individuality.

When a public educational program is designed to, and does, allocate aid on the basis of neutral, secular criteria that neither favor nor disfavor religion, and makes that aid available to all potential beneficiaries on a nondiscriminatory basis, then that program does not contravene the Establishment Clause. *Agostini*, 521 U.S. at 231. Here there is no evidence that, in design or in actual practice, the Ohio scholarship program is anything more. It is a vital social benefit program in which religious schools may constitutionally participate while advancing the common good.

ARGUMENT

I. The Court Has Described the Standards to Adjudicate the Validity of Public Programs that Provide Educational Benefits.

A. Under the Precedent of this Court, a Religion-Neutral and Generally Available Public Benefit Is Presumptively Constitutional.

This Court has long stated that its interpretation and application of the Establishment Clause reflects the Clause's history and the nation's tradition. *E.g., Lynch v. Donnelly*, 465 U.S. 668 (1984). Certainly the government may not assume "sponsorship, financial support, and active involvement...in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The heart of the phrase, for Establishment Clause purposes, is "religious activity." The Clause, this Court has said, is to assure that government stays out of the "precincts" of religion, and vice versa. *Lemon v. Kurtzman*, 402 U.S. 602, 614

(1971); Mark Chopko, *Vouchers Can Be Constitutional*, 31 Conn. L. Rev. 945, 973-74 (1999). The instant case, however, is not about a subject that legitimately concerns only government or religion, but falls within the class of social welfare issues, here, education, in which both institutions have a proper interest and historic role. The case illustrates that both can advance the public's interests without excessively involving one institution in matters proper to the other. *Id.*

The Ohio Scholarship and Tutorial Program, Ohio Rev. Code §§3313.974-3313.979, on its face and in fact, was designed to offer financial assistance to low income families and their children who would otherwise attend the Cleveland public schools. The program applies to any state school district (like Cleveland's) directly supervised and operated by the State Superintendent of Public Instruction, instead of local authority. Ohio Rev. Code §3313.975. Scholarships are available to those whose family income is less than 200% of the "poverty line". Ohio Rev. Code §3313.978. In fact, over 60% of the children receiving scholarships are from families at or below the poverty line itself. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000).

The program is designed so that the student can use the educational aid in several ways, at a public school in an adjacent school district,[2] at an area private school that has registered to participate, or through special tutorial help while attending the Cleveland public schools. Ohio Rev. Code §§3313.976-3313.978. The maximum amount of aid that the state will

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[2]While adjacent public schools have not decided to participate, this is hardly a design flaw of the scholarship program. The Ohio legislature explicitly provided for such schools to be able to participate in the program and for students from Cleveland to be able to select them, and "there is not the slightest hint in the record" that the government of the State of Ohio was aware that these school districts would not participate. *Zelman*, 234 F.3d at 968 (Ryan, J., concurring in part, dissenting in part.)

provide to a child attending a private school is $2250, and is capped at 90% of the tuition the school charges to low income children. Children can also decide not to take scholarships from the program, but rather to attend newly-created "Community Schools", which have no religious affiliation and are not governed by the Cleveland School Board, in which case the state pays that school approximately $4000 per child. Affidavit of Jurkowitz at 2 (146a).[3]

The program is structured so that at least one half of the students receiving aid through the program are receiving tutorial assistance grants while continuing to attend local public schools. Ohio Rev. Code §3313.975(A). The Ohio program makes no distinctions at all between religious and nonreligious private schools that can register for and participate in the program, Ohio Rev. Code §§3313.975, 3313.976, and all participating private schools are required not to discriminate in admissions on the basis of religion, among other factors. *Id.* In this factual and legal setting, this Court has already settled the principles that control.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court sustained a Minnesota tax deduction program covering educational expenses, which was available to parents of both public and private school children. The program permitted deductions from state income taxes, limited to actual expenses paid for school tuition, textbooks and transportation, but capped by statute. *Id.* at 391. Calling it a "fixed principle", the Court rejected the position that "any program which in some manner aids an institution with a religious affiliation" violates the

[3]Reference will be made to affidavits in the record by name of affiant and page number and, where applicable, the page number from the Appendix to the Petition for Writ of Certiorari filed by Petitioners Hanna Perkins School, *et al.*, as follows: "Aff. of Jurkowitz at 2-3 (146a-147a)". Reference to documents contained in the Joint Appendix will be to the Joint Appendix page number, as follows: "Aff. of Grandberry at 1(J.A. 192a)."

Establishment Clause. *Id.* at 393, quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973).

The Establishment Clause was not offended by the tax deduction program where it was available to all eligible taxpayers, and was a form of public assistance made available generally without regard to the private or religious nature of the schools attended by the children of the taxpayers.[4] The program was evaluated within the context of the state income tax system and the beneficiaries of the program were individual parents who decided whether, where, and how to use these benefits. Private religious schools benefitted from the program, if and when they did, "only as a result of numerous private choices of individual parents of school-age children", and so "no imprimatur of state approval...can be deemed to have been conferred on any particular religion or upon religion generally." *Mueller*, 463 U.S. at 399, quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

The Court emphasized the primacy of program design, explicitly rejecting reliance upon after-the-fact statistical analyses about patterns of use:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be

[4]The *Mueller* Court did not artificially limit its review of the program to an examination of by whom, or where, the benefits of the program were actually used in any particular instance, or evaluate only the benefits flowing to parents of students at religious schools. *Mueller*, 463 U.S. at 397-99.

evaluated.

Mueller, 463 U.S. at 401. Thus, while parents of children attending private schools might have had higher deductions, the Court decided that it "need not consider these contentions in detail", and rather, "decline[d] to engage in the type of empirical inquiry into those persons benefitted by [this] state law..." which the plaintiffs had proposed. *Id.* at 401-02.

Three years later, the Court reaffirmed the determinative importance of the purpose and design of a state educational benefit program in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). "Central" to the Court's decision was the fact that the aid recipient had decided where his state funding would be directed, and he, not the government, had "transmit[ted] it" to his school of choice, a Bible college. *Id.* at 488. Not only was the decision to use the aid to study for the ministry an independent and private personal choice, but the program itself "creates no financial incentive for students to undertake a sectarian education". *Id.* It did not "provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions". *Id.*[5]

The Court confirmed that the proper "effects" analysis was of the effect of the program overall, as designed, not the effect

[5]By contrast, the scholarship program at issue here may be said to impose a negative financial incentive against those parents who would use it to help fund private education, because the program provides a maximum benefit of 90% of the otherwise applicable tuition rate, and that only for the very poorest parents, whereas those further from the poverty line receive benefits equal to 75% of their tuition payments. Ohio Rev. Code §3313.978(A). The remainder of the tuition is not the government's responsibility. Ohio Rev. Code §3313.978(C)(4). By contrast, a parent who is content to have his child remain in the Cleveland public school system incurs no expense.

of only one aspect of it. The program overall was a religion-neutral, broadly-available state program which helped defray the educational expenses of any eligible visually handicapped student, created no financial incentives to choose religious as opposed to nonreligious training, and left the decision to the independent private choice of the individual involved.[6] As such, "the Washington program works no state support of religion prohibited by the Establishment Clause". *Id.* at 489.

When the Court thereafter sustained the provision of federally-funded special education assistance to a student on the premises of his religious school, under the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1491 (1994 & Supp. III 1997), it stated "we have *consistently* held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993) (emphasis added). The benefits of the program flowed to all eligible parents covered by the program whether their children attended public or private schools, and flowed to sectarian schools (as certain amounts of both IDEA and Ohio scholarship funds do) "only as a result of numerous private choices of individual parents". *Zobrest*, 509 U.S. at 3, quoting *Mueller*, 463 U.S. at 399. And, as in *Witters*, there was no financial incentive to undertake religious education, and the benefits of the program were made available without regard to the religious or private nature of the institutions that ultimately benefitted from the aid. *Zobrest*, 509

[6]Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred specially to note the importance of *Mueller*, which, for the purposes of the Court's analysis, evaluated the entire Minnesota program as a whole. Justice Powell wrote: "nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (emphasis in original).

U.S. at 10, citing *Witters*, 474 U.S. at 487.

What the Court did *not* do in *Zobrest* is equally important. It did not engage in a statistically-driven analysis of the number of religious schools to which benefits ultimately accrued, nor did it rely on the number of children attending religiously associated schools who would be entitled to IDEA benefits, or the dollar value of those benefits. The question of where these individually directed benefits ultimately flowed, and in what amounts, did *not* decide the Establishment Clause question, as it should not here. *Zobrest*, 509 U.S. at 8-14. "[A]ny attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents...'. Disabled children, not sectarian schools, are the primary beneficiaries of the IDEA...". "Thus, the function of the IDEA is hardly to provide desired financial support for nonpublic sectarian institutions". *Zobrest*, 509 U.S. at 12-13, quoting *Witters*, 474 U.S. at 488 (internal quotation marks omitted.)

Four years later, *in Agostini v. Felton*, 521 U.S. 203 (1997), the Court expressly recognized that the criteria it used for deciding whether a government aid program had the primary effect of advancing or inhibiting religion had "changed". *Agostini*, 521 U.S. at 223. The Court cautioned against the assumption that "all government aid that directly assists the educational function of religious schools is invalid". *Agostini*, 521 U.S. at 225. Courts are to examine with specificity who is directing the use of the aid, to determine whether that use, whatever it is, is properly to be attributed to the government. *Id.* at 224. It is only "*state* decisionmaking", *id.* at 226 (citation omitted) that implicates Establishment Clause dangers in this context. If, on the other hand, funds originating with the government flow to religiously affiliated schools "only as a result of the genuinely independent and private choices of individuals", the Establishment Clause is not violated. *Id.*

It is particularly significant that *Agostini* also jettisoned a host of factual presumptions made in earlier cases, including that public employees on the premises of religious schools would provide religious instruction, that their very presence on the campuses of religious schools created a symbolic union between the government and religion, and that providing public employees to work on religious campuses financed religious indoctrination by the government. *Id.* at 226-28. Courts are, rather, to rely on the evidentiary record before them to decide whether, *in fact*, the program in question actually had the effect of advancing religion. The clear legal benchmark is whether the aid program is religiously neutral, is generally available to a broad class of beneficiaries, supports a public function, and is available without government incentives for or against religion.[7]

Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000), confirms these criteria. The plurality opinion in *Mitchell* emphasized particularly the importance of governmental religious neutrality, and wrote that where governmental aid "is neutrally available and, before reaching or benefitting any

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[7]Neutrality does not shield a legislature's "covert" intention to target religious activity for particular benefits or detriments from effective constitutional review. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993). The Constitution prohibits "subtle departures from [religious] neutrality" just as it does more obvious ones. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Reviewing courts cannot restrict themselves only to a review of formally-neutral statutory criteria, while remaining "studiously oblivious" to the effects of the government's actions in the Establishment Clause context. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment). For example, in *Santa Fe Independent School District v. Doe*, ____ U.S. ___, 120 S.Ct. 2266 (2000), the Court reviewed the record evidence concerning the school district's historic actions in regard to school prayer, its conduct of the current policy, its delivery of prayer over the school's public address system, under faculty supervision, and the regulation's title ("Prayer at Football Games"), among other factors and concluded that the District's newly - adopted "election" practice was actually and demonstrably a covert attempt to further evangelical religious conduct. *Santa Fe*, 120 S.Ct. at 2277-79.

religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion". 120 S.Ct. at 2544 (internal citations omitted). Justices O'Connor's and Breyer's concurrence recognized the importance of governmental neutrality, but emphasized that *Agostini* should control when evaluating a program's primary effect. *Id.* at 2560. Both the plurality and the concurrence agreed on the significance of religiously neutral eligibility criteria in evaluating the Establishment Clause implications of a government aid program. *Compare,* 120 S.Ct. at 2541 (plurality) *with id.* at 2561 (O'Connor, J.)

The plurality and the concurrence also clearly agree that the proper legal analysis does not turn upon the numerical proportion of aid benefits that ultimately flow to religious organizations. In *Mitchell*, 30% of the educational benefits available was used at private schools; of those, 34 of 46 were Catholic, seven were associated with other denominations and five were nonreligious. 120 S. Ct. at 2538. Neither the plurality nor the concurrence suggests that the numbers or proportions of ultimate recipients who attended religious schools have any legitimate bearing on the legal analysis. "We were not 'willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid'". *Id.* at 2562 (O'Connor, J., concurring) (quoting *Agostini*, 521 U.S. at 229.)

Program design delineates the scope for judicial review. The Court will evaluate whether the program is neutral with regard to religion, is generally available to a broad class of beneficiaries, supports a public function, and creates no financial incentives for or against making a choice of a religious provider. If so, and absent evidence that the program hides some improper governmental purpose, the program is constitutional.

B. The Court Below Relied on Analyses and Standards that neither Reflect nor Apply this Court's Jurisprudence.

The Sixth Circuit wrongly decided that the Ohio scholarship program was in violation of the Establishment Clause, principally because it concluded that the Supreme Court decision most factually similar to the case was *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). There are two principal reasons why *Nyquist* is not applicable, much less controlling. The first concerns the changes this Court has made in its own jurisprudence since then, detailed above. The second reflects the Court's concern with design and implementation.

The program at issue in *Nyquist* was designed by the New York legislature to provide financial support *only* to the state's private schools themselves, and to ensure that the private schools remained financially viable. *Nyquist*, 413 U.S. at 762-769. By providing direct government funding of private schools, and direct tuition reimbursement, the Court said, the legislature had *intended* to "provide assistance to private schools, the great majority of which are sectarian". *Id.* at 783. "[T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions". *Id.*

The Ohio program, on the other hand, was designed and structured to give means tested assistance to low income students living within a school district that had been placed under the control of the state's superintendent of schools. Ohio Rev. Code §3313.978, §3313.979. It was designed to provide no grants to any schools themselves, and it did *not* do so. The only beneficiaries are children and families who receive a scholarship check, "payable to the parents of the student entitled to the scholarship", who then decide privately to which of the participating schools it should be directed. *Id.* at §3313.979. *See Nyquist*, 413 U.S. at 782-83, n.38.

The Ohio scholarship program also did, in fact, operate as the legislature had intended, to provide low income children with better educational options. The range of options was narrowed by the decision, for reasons that do not appear in the record and can only be supposed, of neighboring public schools to refuse to participate, but a broad range of options nevertheless existed. Low income Cleveland public school students had the option of remaining in their public schools,[8] doing so and receiving tutorial assistance, attending "Community Schools", attending private religious schools of a variety of denominations, or attending private nonreligious schools. All schools, alike, in order to participate in the scholarship program, must register and must meet state minimum academic standards and must not discriminate on the basis of race, religion or ethnic background. Ohio Rev. Code §3313.976. Like state educational aid to all disabled students, or the provision of education-related tax incentives to all eligible parents, Ohio's program has the primary effect of furthering important social interests, not of ensuring that religious schools are financially supported.

This amicus also writes to emphasize three particular strands of error that infuse the majority's approach to the case, beyond its erroneous reliance on *Nyquist*.[9] First, the *Zelman*

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[8]Undoubtedly a very large number of students and their parents made this choice. Of all the otherwise eligible children in Cleveland, Ohio, only 3761 enrolled in the program. *Zelman*, 234 F.3d at 949.

[9]The majority in *Zelman* has also revived, and apparently depended in part upon, a legal theory that has been accorded little judicial weight since *Nyquist*, that financial aid ultimately flowing from parents to religious schools could thereafter be "divertable" by the school to religious uses, and so have a primary effect of advancing religion. *Zelman*, 234 F.3d at 960. "Divertability" was simply not an issue treated by this Court in *Mueller*. Moreover, in *Witters*, the funds were ultimately paid to a bible college for training Mr. Witters in the ministry, and so clearly were used (under the mode of analysis used by the Sixth Circuit below) for advancing religion. *Witters*, 474 U.S. at 749-50. In this case, divertability is

court ignored this Court's emphasis on design and adopted a "result-driven" and logically backwards mode of analysis in which the mere statistical frequency of individual, private decisions to attend religious schools led to erroneous conclusions about the nature of the program itself and its primary effects. Second, it focused on only one part of the scholarship program itself, rather than on the full panoply of alternatives available under it, or its larger educational context. Third, it ignored a record that consistently demonstrates private, individual decisionmaking, without record evidence to the contrary, despite this Court's contrary injunction in *Agostini*.

The decision below turns exclusively on a crude numerical analysis in which the result (that a large proportion of Cleveland parents who decided to take advantage of the program chose religious schools) drives the legal assessment of the program. Put concisely, the *Zelman* majority decided that the Ohio scholarship program had a primary effect of advancing religion, under the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because it concluded that there was only an "illusory choice" afforded to participants as between attendance at private and public schools, and because "the majority of places available in the program are for students attending sectarian schools". *Zelman*, 234 F.3d at 959. Thus, because many of those who decided to participate decided to enroll in private schools, and 46 of the 56 private schools registered to participate in the program were religiously affiliated, the court concluded that the "primary effect" of the program was to "provide a grant of state aid directly and predominantly to the coffers of the private, religious schools,... There is no neutral aid when that aid principally flows to religious institutions...." *Id.* at 949, 960-61. If too many recipients use their scholarships at

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as much a "red herring". The actual scholarship benefits here go to the parents in question, who decide to "spend" them at the participating school they decide is best for their child.

religious schools, that government program by definition could not be constitutional, according to the court below. Yet, this sort of numerical analysis has been repeatedly and explicitly rejected by this Court. *Mueller*, 463 U.S. at 401. But the mode of analysis this Court rejected in *Mueller* is the very one on which the *Zelman* majority depends.

In evaluating the effect of *Mueller* on this case, it is significant that the Court there resolved a conflict between the appellate decision in *Mueller,* and that of the First Circuit in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980). *Mueller*, 463 U.S. at 391. *Norberg* turned upon the facts that 94% of those benefitting from the program attended religious schools, that 79% of the students attending nonpublic schools attended religious schools, and that the majority of parents eligible for the program sent their children to religious schools. 630 F.2d at 859-860. These figures, the First Circuit believed, showed that the program conferred a governmental benefit along "nearly solid sectarian lines". *Id.* *Mueller*, of course, resolved that circuit conflict by rejecting a mode of analysis driven by statistics reflecting private parental preferences for religious schools.[10]

It is this very same sort of numerically-focused analysis that was rejected in *Agostini* when the Court wrote:

> [n]or are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school studentswho happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

Agostini, 521 U.S. at 229. This same concept was reinforced three years later by both the plurality and the concurrence in *Mitchell*. 120 S.Ct. at 2542; *id*. at 2562 (O'Connor, J., concurring.) By reasoning from one particular result, backwards, to the presumed overall cause, the panel majority makes the Establishment Clause turn upon the proportion of aid that ultimately flows to religious entities, no matter who directs it there or how the program is designed.[11] Having been resoundingly rejected by all of this Court's recent government aid cases, this result-driven approach must likewise be rejected here.

A second major flaw in the Sixth Circuit's approach to this case is that it examined only one narrow portion of the scholarship program itself, and neither considered the full range of alternatives it presented, nor evaluated them in the context of the broader state educational program. The primary function of the Ohio scholarship program could hardly be to provide financial support for religious schools, since the beneficiaries may choose to use scholarship benefits at any of a broad range of private schools, both religious and nonreligious, or at none at all. Indeed, the program as designed by the Ohio legislature made scholarship funds "available" to parents to use to attend neighboring public schools. *Mueller*, 463 U.S. at 397. Ohio Rev. Code §3313.978(A)(1). It is only the unrelated, after-the-fact, refusal of neighboring public schools to participate in the

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[10] As Justice Powell pointed out in *Witters*, 474 U.S. at 491, n.3, whether one individual decides to use government benefits at a religious school, or whether over 90% of benefits flow to religious schools, is not legally significant. Rather, "the aid was thus channeled by individual parents and not by the State", making the program permissible under the "primary effect" test of *Lemon*. *Id.*

[11] The *Zelman* majority does not propose any standards for "how much" ultimate religious use of originally-governmental aid is "too much", consigning the federal courts to a continuing quagmire of case-by-case decision making in which the only fixed legal standard is that if the government's "aid principally flows to religious institutions", no matter who directed it there, or why, the second prong of the *Lemon* test is violated. *Zelman*, 234 F.3d at 961.

program that prevented recipients from being able to exercise that choice as well. Students may also attend "Community Schools".

After first acknowledging that 10 of the 56 participating private schools are not religiously affiliated, the majority relegated all but religious schools to the status of nonparticipants in the program. It decided that the other options open to Cleveland public school parents, such as the Community Schools program, or indeed the public schools themselves, "were at best irrelevant", thus skewing the legal landscape so that the scholarship program was unavoidably viewed out of context. *Zelman*, 234 F.3d at 958. It held, without record support, and ignoring that parents, not schools, were the intended beneficiaries, that "practically speaking, the tuition restrictions... limit the ability of nonsectarian schools to participate in the program...." *Id.* at 959. It disparaged parental choices as "alleged" and "illusory". *Id.* The majority ultimately stated flatly that "here aid goes only to students enrolled in private schools." *Id.* at 960. By so limiting the program, simply by stating it was so, and ignoring the real and larger educational context, the majority ensured that it could not but be seen as violative of the Establishment Clause.

The majority's decision proves the accuracy of the Court's words in *Lynch v. Donnelly*, 465 U.S. at 689, that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." Just such a "crabbed reading", both of that Clause and of the scholarship program, is at the heart of the *Zelman* majority opinion. *Id.* at 687. Viewed as a whole, the scholarship program at issue here presents a broad range of private and public educational alternatives for low income parents in Cleveland. The program provides meaningful nonreligious alternatives, none of which have ever been demonstrated to be unavailable to any participant who sought to

use them. *Zelman*, 234 F.3d at 969. The program provides for education in the public school system with additional support by way of tutoring paid for as part of the scholarship program; indeed, at least as many students are helped in this fashion as could possibly attend all private schools with scholarship help. Ohio Rev. Code §3313.978(b).

The *Zelman* majority erred in treating options such as the Community Schools program as "irrelevant". 234 F.3d at 958. While the Community Schools program is enacted in a chapter of the Ohio Revised Code different from that pertaining to the scholarship program, this is the storied "distinction without a difference". Indeed, in both *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), the same argument was rejected.[12] The existence and availability of a range of educational choices for parents - - public schools, public school tutoring, Community Schools, religious schools, and nonreligious private schools -- is important to the analysis. When Cleveland parents choose, as many have, to send their children to religious schools, it is a true independent choice, not an "illusory" one.

A third major flaw in the *Zelman* majority's approach is its dependence upon judicial presumption rather than record evidence. This deserves special emphasis because of the pivotal role that this problem has played in the development of recent Establishment Clause jurisprudence. One of the *Agostini* Court's primary criticisms of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), was that it turned on unsupported assumptions about how the aid program could potentially be misused. *Agostini*, 521 U.S. at 219-20. Potential problems, the

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[12] As the Court wrote in *Wolman* "the Ohio Code provides in separate sections for the loan of textbooks to public school children and to nonpublic school children", which was found to be of no consequence. *Wolman*, 433 U.S. at 238, n.6. In *Meek* the Court observed that "it is of no constitutional significance whether the general program is codified in one statute or two". *Meek*, 421 U.S. at 360, n.8.

Court has said, do not trump the genuine design of the program. *Zobrest*, 509 U.S. at 12-13. Blanket presumptions about the nature of the aid that could legitimately be provided, or to ad[illegible] "flat rule[s]" would "exalt form over substance". *Agostini*, 521 U.S. 223-4. Rather, the Court emphasized the need to review the record for evidence of *actual* constitutional infringements. *Id.* at 224.[13] Indeed, absent contrary record evidence, the assumption to be made is that aid programs have been properly and constitutionally effected. *Id.*

The *Zelman* majority apparently rejected this teaching, and grounded its opinion on outright factual errors, that program "aid goes only to students enrolled in private schools", as well as on ungrounded conclusions that the program "discourages...participation by schools not funded by religious institutions". 234 F.3d at 959, 960. Further, it depended upon purely factual assertions for which no record support was ever adduced, for example, the claim that religious schools have lower overhead costs and lower tuition needs than other private schools because of income from private donations. *Id.* In fact, there is no evidence of record that any participant desiring to attend a nonreligious school was ever denied admission, or was forced to attend a religious school as a result of governmental financial incentives rather than personal individual choice. *Id.* at 969, 971 (Ryan, J., concurring in part and dissenting in part.) Nor, indeed, was there any factual evidence adduced showing that eligible beneficiaries who wished to use the tutorial assistance provided for by the scholarship program, were ever unable to do so.

Judge Clay pointed to the fact that none of the neighboring

[13]This echos the Court's explicit rejection, in *Mueller*, *supra*, of another appeal for presumption-based, inflexible rules turning on the statistical character of program recipients. *Mueller*, 463 U.S. at 401. Rather, the Court said that the constitutionality of the program was to be decided by review of the "essential features" of the program, operating as it was designed to do. *Id.* at 396-98.

public schools had decided to participate in the program as an indication that the Ohio scholarship program provided no realistic alternatives to religious education and so the legislation had an impermissible "primary effect" of advancing religion. *Id.* at 959-61. The court's discussion of this issue, however, fails to reveal a single record citation showing that this was the intention of the Ohio legislature when it passed the pilot scholarship program, or that it actually had that effect. Judge Ryan, who concurred in part and dissented in part in *Zelman*, related that "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate." *Id.* at 968. Indeed, neighboring public school districts could decide to participate in the future. The dissent also demonstrated the existence of other private choice options that do not involve religious schools at all. *Id.* at 970-71. In short, while an actual improper purpose for legislation may indeed throw doubt upon its constitutionality, particularly if it is targeting religion, this amicus suggests that, at the least, there must be some demonstrated record or evidentiary support for such a proposition for a court to so conclude, particularly in the face of unimpeachable program design and structure.

The majority's fundamental presumption is indeed perverse, and is one of antipathy toward religion generally: that it is inconceivable that scholarship recipients would frequently have chosen religious schools for their children, if the program had truly been religiously neutral and broadly available and created no financial incentives to choose such a school. That having occurred, the majority reasons, the program is *ipso facto* unconstitutional. Under this presumption, the frequent choice of religious schools, no matter how independently made, would doom any scholarship or government aid program. We suggest that the majority's logic would move constitutional jurisprudence backwards.

II. The Ohio Scholarship Program Is Constitutional When Reviewed in Light of this Court's Current Standards.

Clearly, nothing in the structure or content of the Ohio scholarship program shows that it does anything other than provide benefits neutrally to a broad class of citizens, defined without reference to religion. *Zobrest*, 509 U.S. at 8. The aid is absolutely neutral and its amount is no different depending upon whether the recipient's child attends a religious school or a nonreligious school. It benefits a broad class of citizens, literally thousands of the least well-off families in Cleveland. Beneficiaries are defined only by their family's income level, their residence in the Cleveland school district, and their desire to either obtain tutorial benefits and remain in the public schools, or attend another school whether nonreligious and private or any of a variety of religious private schools representing a broad spectrum of denominations.

The revised "primary effect" test adopted by this Court in *Agostini* also emphasizes the design and structure of the program in question. These criteria are whether the aid results in governmental indoctrination of religion, whether the aid program defines its recipients by reference to religion, and whether the aid creates an excessive entanglement between religion and government. *Agostini*, 521 U.S. at 234. The key to the first of these criteria is whether the aid program, as designed and operated, results in *governmental* indoctrination.

Any review of the Ohio scholarship program shows that the government involves itself in no way whatsoever in the religious instruction of children who choose to attend religious schools. No facet of the program itself, and no fact attested to in any of the affidavits of record here,[14] show that "government

[14]To the contrary *see, for example*, Appendix to Petition for Writ of Certiorari filed by Petitioners Hanna Perkins School, *et al.*, at 80a through 188a.

inculcation of religious beliefs" is occurring here.[15] *Id.* at 223. To the contrary, the program makes no distinction at all between religious schools and nonreligious schools (and clearly grants no especial benefits to the latter), and prohibits discrimination in admission based on religion while imposing affirmative income-based priorities for admissions to participating private schools. Ohio Rev. Code §3313.976 (A)(4) and §3313.977. It does not governmentally restrict (but in fact encourages) the participation of neighboring public schools. Ohio Rev. Code §3313.976(C). The benefits that recipients may receive from participating in the program are precisely the same whether they decide to use them at a religious or a non-religious school. These design factors show that the government simply is not involving itself at all in religious indoctrination. The scholarship program is, by design, genuinely neutral as to the matter. An affirmatively religious choice of schools, if one is made, is the "genuinely independent and private choice[]" of the recipient's family. *Agostini*, 521 U.S. at 226.

The Ohio scholarship program also does not "define its recipients by reference to religion". *Agostini*, 521 U.S. at 234. The design of the program sets standards for program participation, which include low income levels, attendance at one of the failed Cleveland public schools, and, under certain circumstances, status as a prior enrollee or as a sibling of another enrolled student. Ohio Rev. Code §§3313.978, 3313.977. None of these standards bears any relationship to religion. In fact, the evidence of record is that the religious preferences of school applicants do not have any bearing on beneficiaries' admission to those participating schools that are

[15]Even if some religious schools are ultimately better off as a result of private choices of scholarship recipients, the Court has made it clear that it does not adhere to any rule that "government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. Obviously, any benefit that ultimately flows here to a religious school, is "indirect" at the very most.

religious, or their participation in those schools' educational programs. *See, for example*, Affidavit of Bolek at 1 (182a); Aff. of Berning at 1 (86a); Aff. of Clemons at 2 (96a); Aff. of Cleveland at 1 (97a); Aff. of Cloud at 1 (99a); Aff. of Hackney at 1 (137a).

The design of the scholarship program also answers the subordinate question whether the program creates a "financial incentive to undertake religious indoctrination." *Agostini,* 521 U.S. at 231. There are no greater benefits to be had by attending a religious private school than by attending a nonreligious one. Furthermore, "of all the private nonreligious...schools participating in the program, not one has ever turned away a voucher applicant for any reason". *Zelman*, 234 F.3d at 969 (Ryan, J., concurring in part and dissenting in part). As shown above, the benefits of the scholarship program "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school... [The] program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 234. The record evidence is simply devoid of any indication that the availability of aid turned in any part on the recipients' religion, or on their private decisions about where to attend school. In both design and operation, this program provides no financial incentive to attend a religious school.

It is also significant that the criteria applied by the scholarship program could not possibly themselves have given the *recipients* of the aid any "financial incentive to undertake religious indoctrination," within the meaning of the *Agostini* test. 521 U.S. at 231. The recipients of the aid are the parents who decide to take advantage of it. They have no financial incentive at all to choose religious schools at which to use the aid. In fact, to the contrary, the scholarship program provides only 75% or 90% of the tuition at participating schools,

depending upon income level. Thus, the only effect of the program is to give low income individuals a better range of choices in education, and reduce, but far from eliminate, the costs to parents of some of those choices.

For all the same reasons stated above, the design and structure of the scholarship program also demonstrates that there is no entanglement at all of government with religion. *Id.* at 234. "[N]o serious claim" of excessive entanglement was ever made. *Zelman*, 234 F.2d at 967 (Ryan, J., concurring in part and dissenting part). The opinion below demonstrates no involvement of the government with religion, over and above the existence of a "Cleveland Scholarship and Tutoring Program Administration Providers Manual," *Zelman,* 234 F.3d at 948, and the fact that the state mails scholarship checks to the schools directly, which parents then endorse to the schools. Apart from these minimal and purely administrative contacts, far less meaningful than those at issue in *Agostini*, 521 U.S. at 233-34, *Bowen v. Kendrick*, *supra*, or *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976), the State of Ohio simply does not "entangle" itself at all with any of the religious schools participating in this program.

III. Religious Schools Are not Disqualified from Participating in Public Programs on Account of their "Religiosity", nor Should Suspicions about the Motives of Schools, Teachers and Parents Displace the Record Evidence.

Last year in *Mitchell v. Helms*, a plurality of the Court urged the abandonment of the disqualification of religious schools for participation in broad social programs, based on an

assumption that they are "pervasively sectarian."[16] That opinion indicates a further erosion of a set of presumptions adverse to religion that had previously characterized this Court's approach to the Establishment Clause, factual presumptions that had formed the underpinnings of *Meek v. Pittenger, supra*, *School District of Grand Rapids v. Ball, supra,* and *Aguilar v. Felton*, 473 U.S. 402 (1985). *Agostini* not only rejected the assumption that public employees on the premises of religious schools would participate in state-sponsored religious indoctrination, but rather, "absen[t] evidence to the contrary,...assumed instead" that they would not. 521 U.S. at 224. *Agostini* also rejected, for lack of evidence, the rule that all aid that directly assists religious schools in providing education is invalid. *Id.* at 225.

The majority below erred when it presumed the worst about why religious schools decided to participate in the scholarship program, and the motives of teachers and parents, to support its conclusion that the "primary effect" of the program is governmental support of religion and religious indoctrination. The record makes abundantly clear the actual motivations of the schools, principals, and teachers participating in the Ohio scholarship program, and the actual salutory effects on the beneficiaries.

First, and most importantly, religious schools are not disqualified on the grounds that they take their religion or religious motivations seriously. The nature of a voucher or scholarship program is precisely one in which program beneficiaries (low income children and parents) can make a choice among program participants (schools) that best reflects

[16]Justices O'Connor and Breyer concurred and did not specifically join the plurality opinion of four justices. The concurrence, however, cites to the separate opinion of Justices Scalia and Kennedy in *Bowen v. Kendrick*, which states that focusing on the religious nature of the program participants fundamentally asks the wrong question. *Mitchell*, 120 S.Ct. at 2558, citing *Bowen*, 487 U.S. at 621-22.

how the parents want their children educated. That parents would choose Catholic schools should not be a surprise or a cause for concern. Catholic schools stand for quality education, presented by professionals, who believe that the needs of children are at the center of everything they do. The schools reflect the nature of the communities they serve. Indeed, the overall statistics reflecting the religious makeup of the student bodies at schools participating in the scholarship program reflect extraordinarily high numbers of students whose personal religious beliefs are other than those of the organization to which the school belongs. Aff. of Jurkowitz at 2, 3 (146a-147a); Aff. of Bolek at 1 (182a). That the schools are an expression of the Catholic Church's mission in the world and reflect a set of moral values of those who lead the institution and teach does not undermine the willingness of the schools to abide by their agreements when they participate in the Ohio scholarship program. When the schools promise to participate in the program, they expect to be bound by their commitments. Aff. of Jurkowitz at 4 (149a); Aff. of Dalton at 3, 4 (109a-10a). *See Mitchell*, 120 S.Ct. at 2560-61 (O'Connor, J.) (presuming schools and instructors will comply with program restrictions).

Participating schools are required to, and do, meet all applicable state academic standards and secular instructional requirements. Aff. of Bolek at 2 (183a); Aff. of Jurkowitz at 4 (149a); Aff. of Dalton at 4 (110a) ("these schools teach the S[t]ate-mandated secular courses in a manner most likely to meet current research concerning effective presentation of that subject matter"). Religious schools continue to participate in the scholarship program despite the fact that to do so entails a "net" financial loss for them. Aff. of Jurkowitz at 1 (145a) ("the scholarship amount is less than the cost of providing a [s]tate-required secular education to the scholarship pupil"); Aff. of Bolek at 2, 3 (183a-184a) ("We are pleased to help the Scholarship pupils... however this presents an added financial burden... [T]he $1995 tuition does not cover the costs of the

secular education provided to the children. Since the Pilot Scholarship Program calls for grants equal to 90% of regular tuition, the [scholarship] children at our institution receive $1,795.50 per year".) In fact, children on scholarships are frequently developmentally far behind their grade levels, leading to additional costs and expenses which are borne by the schools themselves. Aff. of Bolek at 3 (184a); Aff. of Gibson at 1 (131a); Aff. of O'Dea at 1 (162a).

Catholic schools participate because of an abiding commitment to help low income, and especially minority and special needs, children, and because of a belief in the tremendous importance of primary and secondary education. Aff. of Bolek at 2, 3 (183a-184a) ("our mission [is] helping educate economically disadvantaged children....."); Aff. of Gibson at 1 (131a); Aff. of Greene at 1 (135a) (this "program has enabled parents and students to make choices that more wealthy families can make and provides opportunities for lower income students to have a fair chance of success in life"); Aff. of Keen at 1(125a) ("most of the [scholarship] children come from underprivileged families that would not have the resources to send their children to a school of their choice"); Aff. of Metzler at 1 (156a); Aff. of Dickson at 1 (125a) ("program has enabled scholarship students to achieve at higher academic levels".)

The record also confirms that teachers are motivated to participate in the program for educational reasons, and because of the special, and otherwise unmet, needs of many of the children so educated. Joint Aff. of School Psychologists at 1-5 (J.A. 200a-205a); Aff. of Barlow at 1 (82a); Aff. of Beasley at 1 (84a); Aff. of Cover at 1(103a) ("there are 120 [scholarship] pupils enrolled in the school this year. They are receiving an excellent education...I remain as a teacher at this school... because I know I can make a difference in a child's life..."); Aff. of Davies at 1 (116a) ("Scholarship families choose St. Vitus

School because they feel comfortable there.....safety and a better learning atmosphere are key issues".)

In much the same way, even if their personal motivations were legally relevant (and they are not), the parents of scholarship students chose religious schools primarily for educational and developmental reasons. Aff. of Barclay at 1(80a) ("the Scholarship program...helps me get a better education for my children that I couldn't otherwise afford"); Aff. of Berning at 1 (86a) ("I selected [our school]... because it was able to provide special help to weaknesses my older son had in school"); Aff. of Brackins at 1 (88a)("the [program] has enabled my son to attend a more favorable educational setting than I could have possibly afforded on my own"); Aff. of Cloud at 1 (99a) ("I am very grateful to the scholarship program because it gives parents the choice of bettering their children's education"); Aff. of King-Eash at 1 (152a).

Many parents of special needs children also decided to select religious schools because of the help that they could provide for their children. Aff. of Jones at 1 (186a); Aff. of Call at 1, 2 (J.A. 190a-191a); Aff. of Dowthit at 1 (127a). In many cases, parents choose religious schools simply because of safety and health conditions. Aff. of Grandberry at 1, 2 (J.A. 192a-193a); ("Another reason for transferring Byron was because of the disturbances within his classroom at [previous school]. Going back to a Cleveland public school would destroy all of the good things that have been accomplished... Not only will his academic progress be stunted, I would fear for the safety of my son"); Aff. of Clemons at 1(95a) ("I feel comfortable that she is being educated in a safe and calm atmosphere and that she now enjoys going to school"); Aff. of Thomas at 1 (181a) ("I can send my children to school and not have to worry abut them getting into fights or experiencing assaults upon teachers. I selected this school because it is safe...".) Aff. of Greene at 1 (135a). In two cases, beneficiaries noted that their children

were happier at their new schools simply because they now had toilet paper available to them in restrooms. Aff. of Goodgame at 1 (133a); Aff. of Hunter at 1 (139a).

Parents choose a school based on their conclusion that the selected school offers the best available education for their children, and they can frequently do so only because of the help the Ohio scholarship program provides. There is no spectre of advancement of religion to be apprehended here. This beneficial and religiously-neutral state program aids disadvantaged families to educate their children in a program in which religious schools, among others, extend themselves to those most in need.

CONCLUSION

For the foregoing reasons, the judgments below that the Ohio scholarship program is unconstitutional should be reversed.

Respectfully submitted,

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